88-1578

NO. _____

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IN THE

# Supreme Court of the United States

October Term, 1983

WESLEY MERRITT,
*Petitioner,*

vs.

STATE OF GEORGIA,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA**

CHARLES R. SMITH
P.O. Box 1440
Cumming, Georgia 30130
(404) 523-5304

THOMAS R. MORAN
116 Pryor Street,
Suite 205
Atlanta, Georgia 30303
(404) 577-3636

*Attorneys for Petitioner*

## QUESTIONS PRESENTED

1. Whether O.C.G.A. §16-14-7(f) facially violates the Fourth and Fourteenth Amendments to the United States Constitution, because it delegates to law enforcement authorities executing a search warrant unbridled discretion to search for and seize anything they choose to seize.

Subsumed is whether the searches and seizures, as conducted in this case under the authority of the statute were general.

2. Whether under color of law the Trial Court's overruling of the motion to suppress based upon a separate prior case involving the co-defendant alone coupled with the Appellate Courts affirmance of said ruling without the warrant and supporting affidavit being a part of the record deprives the petitioner of a full and fair hearing thereby depriving petitioner of his Fourth Amendment rights without due process of law.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Wesley Merritt respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered on January 5, 1984, affirming the petitioner's conviction for conspiracy to sell cocaine in violation of the Georgia Control Substances Act (OCGA 16-13-20).

## OPINION BELOW

The Supreme Court of the State of Georgia entered its opinion affirming the petitioner's conviction on January 5, 1984, and is set forth in appendix A. The Decision is reported at 252 Ga. ____ (1984). Petitioner's motion for Rehearing was denied on January 31, 1984 and is set forth in appendix B. A motion to recall and Stay the Remittitur was granted February 17, 1984 and is set forth in appendix C.

## JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). In that this petition is being filed within sixty (60) days from January 31, 1984, it is timely.

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers; and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in crises arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any persons be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecution, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTE INVOLVED

O.C.G.A. §16-14-7 (f) (formerly §26-3405 (d) (2) Ga. Code Ann.), in pertinent part, provides:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within 30 days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state, in addition to the information required in subsection (e) of this Code section, the date and place of seizure.

## STATEMENT OF THE CASE

The indictment charged that petitioner and 4 other people between June 22, 1982 and October 22, 1982 "did unlawfully conspire to violate Schedule II of the Georgia Controlled Substances Act by joining among themselves and others to sell cocaine and certain members of such conspiracy did sell cocaine in violation of Schedule II of the Georgia Controlled Substances Act".

Co-indictees, Joseph B. Downing, Jr. and Charles Wesley Freeman, pled guilty to the indictment and in consideration for lesser sentences testified for the State (R3, T93, T94). Co-indictee Miriam Ledesma and the petitioner were jointly tried by jury, found guilty and sentenced to 10 years imprisonment. (T428, 431).

On October 25, 1982, authorities executed a search warrant at 1631 Gordon Street, the location of Merritt Realty Co. (T293, T784-785). The warrant listed the items to be seized as a "ledger containing certain drug sales information, drug paraphernalia, U.S. currency, and cocaine." (T784). No such items were found. (T792). However, 19 items were seized ranging from a calendar to typewriters and sales contracts. (T792). No item was incriminating upon its face, nor was any item alleged to be stolen nor was any item contraband. A motion to suppress was filed and overruled. (T72-84, R81). Over objection a desk calendar with the name and phone number of a "Roberto," deposit slips for Wes-Mer Chemical Co. and an employment contract in which the petitioner was named as secretary of Wes-Mer Chemical Co. were entered into evidence.

The warrant authorizing the search of the private residence of petitioner and his office at Merritt Realty Co.

was one of a series of 3 warrants which were the fruits of wiretaps. (T-259).

The petitioner and Ms. Ledesma specifically challenged the sufficiency of the affidavits to support wiretap authorization and challenged whether the information was in fact correct (T-238). Not only were they not properly sealed but the State made copies of the wiretap documents after they were ordered sealed and without the permission of the court (T-225). In fact, there never was a court order authorizing publication of the tapes (T-236).

The wiretap affidavits themselves showed that each new application rested upon the prior application (R65, 125). The court overruled the motions (T-237, 285), specifically finding that the wiretaps were legal and thus not a basis for suppressing physical evidence seized as a result of these searches (T-285). However this ruling was limited to the last two wiretaps and the evidence obtained therefrom (T-285), as the State advised the court it would not use any evidence from the first wiretaps (T-285). The record shows clearly the state put on no evidence to support the legality of the first two sets of wiretaps. Furthermore the State did not put into the Record copies of the search warrant, nor accompanying affidavits or other supporting documentation.

The state argued that the search warrant was authorized by OCGA §16-14-7(f) which authorizes the seizure of property subject to forfeiture under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO).

The petitioner filed pre-trial motions attacking the constitutionality of the statute (R-126, 127). Even though the case was not brought under OCGA 16-14-1 *et seq.*, the court overruled the motion and allowed the evidence in at trial over objection (T-285, 286).

The remainder of the State's case concerning the petitioner consisted of the testimony of two admitted accomplices.

The State's first witness, Derrick Brown testified that he was a convicted felon which sentence he was now serving was hopefully to be modified upon request of the State in consideration for his testimony. (T10). While he was not indicted as a co-conspirator, he testified that Miriam Ledesma had a lot of people selling cocaine for her and that he was one of those persons. (T12). The witness further testified that during a period from December 1981 through April 1982 he had seen the petitioner in the company of Miriam Ledesma and he was "trying to straighten out how she was getting shorted on the money and how she could stretch (the cocaine) by cutting it more." (T15). He had seen the petitioner cut cocaine in the presence of the co-defendant but didn't know if he was helping her or not.

Joseph Downing, a co-defendant who pled guilty for a 6 month sentence testified that he met the petitioner through Ms. Ledesma, that the purpose of the meeting was to get an understanding of what the witness could do with regard to buying cocaine from the petitioner and that he did buy cocaine from the petitioner. (T104). However the witness admitted no other person saw or knew of the transactions between himself and the petitioner. (T137). The only other evidence elicited against the petitioner consisted of a picture of him found in the co-defendant's purse (T48), his being the secretary of Wes-Mer Chemical Co. (T518), a desk calendar with the name and phone number of "Roberto" written upon it (T294) and that he has been seen at Wes-Mer Chemical Co. 3 times in 5 weeks (T350).

However, it was developed that petitioner and Ms. Ledesma were formerly married (T49), that Wes-Mer Chemical Co. was a bona fide cleaning material lab (T328) and that no drugs were found in the petitioner's possession nor did undercover agents ever purchase cocaine from the petitioner. (T71).

## REASONS FOR GRANTING THE WRIT

### I. THE OPINION BELOW UPHOLDING THE CONSTITUTIONALITY OF OCGA 16-14-7 (f) WHICH BY ITS TERMS ALLOWS STATE LAW ENFORCEMENT OFFICERS TO CONDUCT GENERAL SEARCHES AND SEIZURES IS CONTRARY TO THE DECISIONS OF THIS COURT AND IS A QUESTION OF NATIONAL IMPORT.

The questioned statute delegates to law enforcement personnel executing a search, with or without a warrant, unbridled discretion; therefore, it not only violates the Fourth Amendment specificity and particularity requirements, it constitutes an impermissible delegation of the judicial duty and function of determining, in advance, questions of probable cause and the permissible scope of the search. Under the Georgia Statute, the executing officer is given the authority to seize *any* property *he* "has probable cause to believe will be subject to forfeiture and will be lost or destroyed if not seized."

Therefore, the statute authorizes the executing officer not only to determine probable cause but dispenses with the judicial presearch determination of specificity and particularity.

Almost four score years ago, this Court held that a search warrant must describe the property to be seized

with sufficient specificity and particularity, so that nothing is left to the discretion of the executing officer. *Marron v. United States*, 275 U.S. 192, 196 (1927). Where a warrant invites discretion it fails for lack of specificity and is classified as general. See Mascolo, Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy. 73 Dick L. Rev. 1, 5-6 (1968).

It cannot be argued that the statute fits within any exception to rule that searches conducted outside the judicial process without prior judicial approval are per se unreasonable under the Fourth Amendment. *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Coolidge v. New Hampshire*, 403 U.S. 443, 462 91 S. Ct. 2022 (1971).

The search warrants issued here were not general warrants on their face. The things to be discovered were described with particularity. The question is whether the search that was conducted, either under the auspices of the statute or some other exception to the Fourth Amendment, was not confined to its lawful scope and became general. Had the issuing judge been informed of the true reason for the warrant request and the scope of the search contemplated, he might have approved it, subject to explicit limitations on the scope of discovery to prevent an overly intrusive search. But the officers whether relying on the statute's sweep or some other exception, disclosed no such information, arrogating to themselves the magisterial function of setting out the dimensions of the search. In fact, at trial the district attorney said "I stipulate that every item . . . the officer made the decision whether or not it was seizable, not Judge Etheridge." (T276).

As conducted in this case, the search here was a general search. The warrants here authorized a search for "drugs and drug paraphernalia." Armed with these warrants the executing officers embarked on an unconstitutional fishing expedition. As the Supreme Court of Georgia found: "These papers consisted of a ledger reciting two drug transactions; two desk calendars recounting drug transactions and the name of a drug courier; deposit slips for Wes-Mer Chemical Company found at petitioner's real estate business; a business license of Wes-Mer Chemical Company; and an employment contract between a third party and Wes-Mer Chemical Company" (Slip Opinion page 7) (Appendix 8a). All the warrants claimed the items sought to be seized were on the person of either petitioner or Ledesma or in their respective offices and petitioner's home. From petitioner they seized a "manila envelope marked Mr. Merritt (misc papers) (sic)" and "desk calendar (from the desk of Wesley Merritt)".

The Fourth Amendment was enacted in reaction to the evils of the general warrant and outlawed it. *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642 (1967). The RICO statute, which Georgia's statute follows, has been interpreted to authorize the seizure of "all items of whatever nature and no matter how inoffensive, if it is acquired with racketeering proceeds . . . it might be anything from gardening equipment to cookbooks." *Western Business Systems v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980).

It is of course not the rule that only evidence uncovered during a search must invariably be described in the warrant before it may be seized. Where evidence is uncovered during a search pursuant to a warrant the threshold question must be whether the search was confined to the warrants terms.

However it may not be a general exploratory search. *Gurleski v. United States*, 405 F.2d 253, 258 (5th Cir. 1968). As executed here the warrant became an instrument for conducting a general search. Under the circumstances, it was not possible to identify after the fact the distinct items of evidence which might have been discovered had the officers kept their search within the bounds permitted by the warrant; and therefore all evidence seized during this search under the auspices of this statute and warrant should have been suppressed.

"Probable cause cannot be measured by hindsight." *Cook v. State*, 134 Ga. App. 712, 716 215 S.E. 2d 728 (1975).

The validity of the scope of the search depends, generally, upon the reasonableness of the search in light of its purpose. *Ker v. California*, 374 U.S. 23, 33, 83 S.Ct. 1623 (1963).

A search which is initially valid may violate the Fourth Amendment because of "its intolerable intensity and scope." *Terry v. Ohio*, 392 U.S. 1, 18, 88 S.Ct. 1868 (1968). Accordingly, it has been held unreasonable to search and seize a defendant's files. *United States v. Kleefield*, 275 F. Supp. 761 (S.D. N.Y. 1967). In *Marron v. United States*, supra, the Court held that a "ledger showing inventories of liquor, receipts, expenses, including gifts to police officers" could not be lawfully seized pursuant to a warrant. Of course, the mere fact that the articles seized are later found to be incriminating does not validate the search. *Johnson v. State*, 111 Ga. App. 298, 141 S.E 2d 574 (1965).

And because this was a general search everything seized should be suppressed if the exclusionary rules deterrent principle is to have any practical meaning. Cf. *Kremen v. United States*, 353 U.S. 346, 77 S. Ct. 88 (1957).

**Conclusion**

OCGA 16-14-7 (f), viewed in light of the Fourth Amendment, presents a question of national import and in fact this Court has already granted Certiorari on the exact same issue as is presented here. See *Waller v. Georgia*, Case No. 83-321, cert. granted 11/07/83.

II. THE HEARINGS ON THE MOTION TO SUPPRESS IN THE TRIAL COURT WERE NOT FULL, WERE FUNDAMENTALLY UNFAIR AND DEPRIVED THE PETITIONER HIS FOURTH AMENDMENT RIGHTS WITHOUT DUE PROCESS.

"An opportunity for full and fair consideration must be afforded" at trial and on direct appeal. *Stone v. Powell*, 428 U.S. 465 95 S.Ct. 3037, 3083 (1977). Under the standards set forth in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963) the merits of the factual dispute were not addressed or resolved in the trial or appellate court, the state factual determination is not supported by the record as a whole and the fact finding-procedure employed by the state courts was not adequate to afford a full and fair hearing.

In Georgia the burden of proof is upon the state at a Motion to Suppress hearing. *Gray v. State*, 145 Ga. App. 293 243 S.E.2d 687 (1978).

The trial court overruled the motion to suppress based upon its ruling in a distinct and separate case involving the co-defendant, Ledesma. That case was *Ledesma v. State* #39691 decided September 7, 1983. In affirming the trial court, the Georgia Supreme Court overlooked that the issues were different in that in the previous case relied upon it was never established where the calculator and

ledger were found. Nor was the alleged ledger even referred to in the previous case. Thus the state failed to meet its burden of proof as to the ledger which was introduced in the instant case to connect the petition and the co-defendant Ledesma with the marketing of illegal drugs. In addition, these issues could not have been and were not litigated in the previous case. See *Gray v. State*, supra, OCGA 17-5-30 provides that after the motion to suppress has been filed, "(t)he trial judge shall receive evidence out of the presence of the jury on any issue of fact necessary to determine the motion". The failure to hold this mandatory hearing is error, and the error was preserved by the appellant's objection to admission of the evidence sought to be suppressed. *Gray v. State*, supra.

"Collateral Estoppel does not apply here, as the petition had a right to relitigate the same search at a subsequent trial. *People v. Plevy*, 417 N.E. 2d 518, 2 N.Y. 2d 58 (1980).

"The Sixth Amendment provides that 'the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The right of confrontation encompasses the right to cross examine and both are fundamental rights of the accused binding upon the State by the Fourteenth Amendment." *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1964). A complete denial of cross-examination is "constitutional error of the first magnitude." *Brookhart v. Janis*, 384 U.S. 1, 3 86 S. Ct. 1245 (1966).

"The right of cross-examination, thorough and sifting, shall belong to every party as to the witnesses called against him. If several parties to the same case shall have distinct interest, each may exercise this right." OCGA 24-9-64. Under the state law even an undue abridgement, short of a complete denial as is the case here, is grounds

for reversal of a conviction. *Ledford v. State*, 89 Ga. App. 683 80 S.E. 2d 683 (1964); *Holt v. State*, 2 Ga. App. 383 58 S.E. 511 (1907).

Moreover the transcript itself is not sufficient to sustain the State's burden of proving the search and seizure was lawful. See *Lisky v. State*, 156 Ga. App. 45, 46 274 S.E. 2d 89 (1980). The record did not contain the search warrants or affidavit on which it was issued. The warrants and their supporting documentation were relevant in that the petitioner's challenge was that the officers' scope of the execution of the searches and seizures under the warrant was an unconstitutional delegation of authority and the documents showed on their face they were based on illegal wiretaps. Furthermore without even examining these documents the Supreme Court of Georgia upheld the searches based on the trial court's consideration of "the search warrant and supporting affidavits in determining there was sufficient probable cause to authorize the searches." (Slip Opinion page 6, Appendix 7a).

**Conclusion**

The denial of petitioner's most basic right to due process at both trial and appellate level requires the grant of the petition and reversal.

## CONCLUSION

The petition for a writ of certiorari should be granted in that this case is controlled by *Waller v. Georgia* Case No. 83-321, cert. granted 11/7/83.

Respectfully submitted,

THOMAS R. MORAN

CHARLES R. SMITH
*Attorneys for Petitioner*

## CERTIFICATE OF SERVICE

I, Charles R. Smith, Petitioner's counsel of record, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court, I have this day served three true and correct copies of this Petition for Writ of Certiorari upon Respondent, by depositing three copies of this Petition in the United States Mail, with adequate postage and addressed to:

MICHAEL J. BOWERS
Attorney General
132 State Judicial Bldg.
40 Capitol Square
Atlanta, Georgia 30334

BEN OEHLERT
Assistant District Attorney
Fulton County Courthouse
Seventh Floor
136 Pryor Street
Atlanta, Georgia 30303

This 23 day of March, 1984.

Charles R. Smith

CHARLES R. SMITH
*Attorney for Petitioner*

# APPENDICES

## APPENDIX A

In the Supreme Court of Georgia

Decided: JAN. 5, 1984

40227. LEDESMA, et al v. STATE
40315. MERRITT v. STATE

GREGORY, Justice.

Miriam Billings Ledesma and Wesley Merritt were convicted of conspiring to sell cocaine in violation of the Georgia Controlled Substances Act. The indictment charged that appellants, along with three other named individuals, "from the 22nd day of June 1982 through the 22nd day of October 1982, did unlawfully conspire to violate Schedule II of the Georgia Controlled Substances Act by joining among themselves and others to sell cocaine, and certain members of such conspiracy did sell cocaine in violation of Schedule II of the Georgia Controlled Substances Act." The three co-defendants entered guilty pleas; two of them, Wesley Freeman and Joseph Downing, testified against appellants at trial.

(1)(a) Appellants argue the trial court erred in denying their motions for directed verdicts of acquittal, OCGA § 17-9-1. Appellants maintain the State's evidence failed to prove a conspiracy took place within the time frame alleged in the indictment. "In proving the time of the commission of an offense the State is not, as a general rule, restricted to proof of the date alleged in the indictment but is permitted to prove its commission on any date within the statute of limitations." *Grayson v. State*, 39 Ga. App. 673 (148 SE 309) (1929); *Price v. State*, 247 Ga. 58, 59 n. 1 (273 SE2d 854) (1981). Where, however,

the indictment specifically alleges the date of the offense is material, the accused may be convicted only if the State's proof corresponds to the date alleged. *Bloodworth v. State*, 128 Ga. App. 657 (197 SE2d 423) (1973); *Price*, supra. The indictment in this case did not allege the dates of the offense were material. We hold that so long as the evidence shows the existence of a conspiracy as alleged in the indictment, without regard to the dates alleged, the State may offer any evidence relevant to the conspiracy during the statutory period of limitations.[1]

Here, the State's evidence showed that in May, 1982 Derrick Brown committed an armed robbery in which appellant Ledesma's purse was taken. Following Brown's arrest police recovered the purse. Inside it they found a ledger cataloging drug-related transactions and a record of monies owed her by persons to whom she supplied drugs. At the trial of this case Brown testified that he had observed Ledesma "cutting cocaine" on a number of occasions between December, 1981 and March, 1982. Brown also admitted Ledesma had been his "source" for cocaine since December, 1981.

Co-defendant Wesley Freeman testified "in the summer of 1982" he received drugs, which he subsequently sold, from co-defendant Joseph Downing. According to Freeman, appellant Ledesma supplied these drugs to Downing. Freeman further testified that "in September or October" of 1982 he observed appellant Ledesma supply drugs to co-defendant Delores Snead; Snead, in turn, gave a portion of these drugs to Freeman to sell.

Co-defendant Joseph Downing testified that appellant Ledesma supplied the drugs which he sold. He also testified that in September or early October of 1982 [2] he heard Wesley Freeman telephone appellant Merritt to arrange

for the delivery of a package of cocaine.

Both Downing and Freeman admitted selling cocaine during the alleged time of the conspiracy. At least one sale by Freeman was corroborated at trial by the testimony of an undercover police office.

An October 23, 1982 search of the Wes-Mer Chemical Company, in which appellants Ledesma and Merritt were corporate officers, disclosed substantial drug paraphenalia and numerous plastic bags containing cocaine residue. In Ledesma's desk police found a drug-testing apparatus and ledgers recounting drug transactions. The trial court did not err in denying the motion for directed verdict of acquittal. The evidence showed an established organization, headed by Merritt and Ledesma, which conducted seminars in drug sales techniques and supplied cocaine to middlemen who, in turn, provided it to others for sale "on the street." This evidence meets the standard set forth in Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

(b) Nor did the trial court err in denying appellant Merritt's motion for directed verdict on the ground that the testimony of accomplices Downing and Freeman was uncorroborated. Where two or more accomplices testify at trial, the testimony of one accomplice may be corrorobated by the testimony of the other. *Eubanks v. State*, 240 Ga. 544(1) (242 SE2d 41) (1978). The drug papaphenalia recovered from Wes-Mer Chemical Company and evidence showing Merritt's association with two drug couriers provided additional corroboration, thus satisfying the requirement of *Birt v. State*, 236 Ga. 815 (225 SE2d 248) (1976).

(2) Following the May, 1982 armed robbery of her home, Ledesma reported the incident to the police, in-

cluding the fact that her purse had been taken by the robber. She identified Derrick Brown as the robber and gave police a description of him. Police subsequently apprehended Brown who led them to a wooded location where he had hidden Ledesma's purse. According to police testimony, the purse was inventoried for use in the armed robbery charge against Brown; the officer conducting the inventory testified that it was police procedure to inventory recovered stolen property. During the inventory police discovered ledgers detailing drug transactions.

Prior to the trial of this case Ledesma filed a motion to suppress these drug ledgers. The trial court denied the motion and the ledgers were admitted in evidence. We find no Fourth Amendment violation. The police recovered property which Ledesma reported stolen. A routine police inventory was conducted to determine whether the purse, in fact, belonged to Ledesma and whether the currency Ledesma had reported was in the bag remained there. The police were in lawful possession of Ledesma's purse, and it was proper to make a good-faith inventory of the contents. See, *Johnson v. State*, 23 Ariz. App. 64 (530 P2d 910) (1975). We hold that this search and seizure was reasonable under the Fourth Amendment.

(3) Appellants argue the trial court erred in denying Ledesma's motion to suppress evidence seized in a search of her car pursuant to an arrest on September 14, 1982. As a result of this arrest Ledesma was convicted of posession of a firearm and violation of the Controlled Substances Act. This court affirmed, finding the motion to suppress was properly denied. *Ledesma v. State*, # 39691 (Decided September 7, 1983).

Prior to the trial of this case Ledesma renewed her motion to suppress the evidence seized as a result of the

September 14 arrest. The trial court [3] declined to put the State to its proof a second time, but permitted appellants the opportunity to call witnesses or otherwise offer evidence which would raise issues different from those raised in the first motion to suppress. Appellants declined to do so. We find no error.

(4) Appellant Merritt argues the trial court erred in refusing to charge the jury that a witness may be impeached by proof of his conviction of a crime of moral turpitude. The trial court instructed the jury that a witness may be impeached by contradictory statements or by disproving facts he has testified to.

Over the State's objection appellant was permitted to elicit responses from Joseph Downing and Wesley Freeman that each had prior felony convictions. Appellant did not offer the records of these convictions in evidence. This court has held, for the purposes of impeachment, the prior conviction of an adverse witness cannot be shown by cross-examination of the witness. To impeach a witness by a prior conviction the conviction must be proved by the record of conviction itself, not by cross-examination. *Timberlake v. State*, 246 Ga. 488, 499 (271 SE2d 792) (1980). Even though the trial court erroneously allowed appellant to question the witnesses about past felony convictions, appellant is not entitled to the requested charge on impeachment because he failed to offer the proper evidence which would be the records of conviction.

(5) Appellants argue that their character was impermissibly placed in evidence twice during trial. Motions for mistrial were made in each instance and denied by the trial court.

(a) When asked by the State "in what capacity" he had ever seen Ledesma in the company of a drug courier

known as "NeNe", Derrick Brown replied, "Just large quantities of marijuana." Appellants argue this put Ledesma's character in issue by bringing in evidence of an unproved crime. Brown's statement was, however, relevant to prove Ledesma's association with a drug courier whom the State linked to the conspiracy. "Evidence relevant to an issue in the case is not rendered inadmissible because it may incidentally impugn the character of an accused where character is not otherwise in issue." *Duck v. State*, 250 Ga. 592, 598 (300 SE2d 121) (1983).

(b) On direct examination the State asked the officer who arrested Ledesma on September 14, 1982 to identify calculator tapes taken from Ledesma's purse "without going into the reason for the investigation" leading to his possession of her purse. These calculator tapes contained "names and figures" which the State argued were linked to drug transactions made in furtherance of the conspiracy. On cross-examination this officer was asked if Ledesma consented to the search of her purse. The officer answered, "she was under arrest at the time, counselor." Ledesma argues the officer's statement improperly introduced evidence of another crime and was unresponsive to her question. The trial court found that the question had been asked to suggest a lack of authority to examine Ledesma's purse, and that the officer's explanation of his investigation was admissible. "Under the facts set forth we do not think that the trial court erred in overruling the . . . motion for mistrial. The answer complained of [was] responsive to questions propounded by the defense consel . . . A trial court does not commit error by failing to strike answers which are responsive or which explain responsive answers." *Lemon v. State*, 235 Ga. 74 (218 SE2d 818) (1975).

(6)(a) Appellants argue the trial court erred in denying their motions to suppress evidence seized in three searches conducted in October, 1982. It is not disputed that electronic surveillance was used to gather information which, in part, established probable cause for the warrants used to execute these searches. Appellants maintain the affidavits used to support the authorization of the wiretaps were insufficient as a matter of law. They insist this insufficiency renders the search warrants invalid.

The trial court conducted a hearing on this motion to suppress, considering the affidavits used to support the issuance of the wiretaps and receiving testimony from the trial judge who authorized the electronic surveillance in this case. Thereafter the trial court ruled that the wiretaps were lawful. Appellants have not demonstrated to this court in what respect the evidence before the authorizing judge was insufficient. Absent a showing of error to this court, the judgment of the trial court is presumed to be correct. *Miller Grading Contractors, Inc., v. Ga. Federal Savings & Loan*, 247 Ga. 730 (279 SE2d 442) (1981); *Watson v. Stynchcombe*, 240 Ga 169 (240 SE2d 56) (1977).

(b) Appellants argue that evidence obtained from the electronic surveillance was not properly sealed as required by OCGA § 16-11-64 (b)(8). Pretermitting a resolution of the merits of this issue, we note that the remedy for a violation of this section is to render the wiretap evidence inadmissible. See *Cox v. State*, 152 Ga. App. 453 (263 SE2d 238) (1979). As appellants concede no wiretap evidence was admitted at trial, we find no error.

(7)(a) Appellants next make a number of inter-related attacks on OCGA § 17-5-21, which sets forth the scope of a search pursuant to a warrant, and OCGA § 16-14-7(f), which authorizes the seizure of property subject to

forfeiture under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO).

According to appellants, a number of their "private papers" were seized in violation of OCGA § 17-5-21 and the Fourth Amendment to the United States Constituion during the October, 1982 searches. These papers consisted of a ledger reciting drug transactions; two desk calendars recounting drug transactions and the name of a drug courier; deposit slips for Wes-Mer Chemical Company found at appellant Merritt's real estate business; a business license of Wes-Mer Chemical Company; and an employment contract between a third party and Wes-Mer Chemical Company. Both the business license and contract denominated appellant Merritt as a corporate officer in Wes-Mer Chemical Company, and both were found during the search of Merritt Realty. Appellants maintain the scope of the search warrants did not extend to the seizure of these papers. These search warrants were not offered in evidence and are not a part of this record.

Appellants submit that these papers were seized under the purported authority of OCGA § 16-14-7 which permits the seizure of "all property of every kind used or intended for use in the course of . . . a pattern of racketeering activity . . ." Appellants insist that this statute conflicts irreconcilably with both OCGA § 17-5-21 and the Fourth Amendment which, appellants argue, do not permit the seizure of private papers in absence of a warrant authorizing their seizure. We point out that OCGA § 17-5-21 does not preclude the seizure of private papers not listed in the warrant where those papers are the instrumentalities of a crime and the search is otherwise valid. *Tuzman v. State*, 145 Ga. App. 761 (244 SE2d 882) (1978), cert. den. 439 U. S. 929 (99 SC 317, 58 LE2d

323). Nor does the Fourth Amendment preclude the seizure of private papers under these circumstances. U. S. v. Couch, 648 F2d 938 (CA 4 1981), cert. den. ____ U. S. ____ (102 SC 491, 70 LE2d 259) (1981); Louie v. U. S., 426 F2d 1398 (CA 9) (1970), cert. den. 400 U. S. 918 (91 SC 180, 27 LE2d 158); 79 ALR2d 1005.[4] Furthermore, we hold that these documents are not private papers. See, McCormick, *Evidence* (2d Ed.), § 170, pp. 380-381. See also, LaFave, *Search and Seizure*, § 2.6(e), pp. 395-8. Appellants concede that these papers could have been seized under the broad reach of OCGA § 16-14-7(f). As we have determined that the seizure of these papers contravened neither OCGA § 17-5-21 nor the Fourth Amendment, we do not find the conflict urged by appellants.

(b) This court has upheld the RICO statute against the facial constitutional attack made here. *Waller v. State*, 251 Ga. 124 (____ SE2d ____) (1983). There is no merit to appellants' contention that this statute gives law enforcement officers unbridled discretion to search for evidence of illegal activity.

(8) The record indicates that at the hearing on the motion to suppress evidence obtained in the October, 1982 searches, the trial court considered the search warrants and supporting affidavits in determining there was sufficient probable cause to authorize the searches. The failure to put the search warrants in evidence is not reversible error where appellants have not shown harm. *Merritt v. State*, 121 Ga. App. 832 (175 SE2d 890) (1970).

(9) We have carefully examined appellants' enumerations of error regarding the correctness of the trial court's charge and find them to be without merit.

(10) Following their convictions in February, 1983,

appellants filed motions for appeal bond. The trial court denied the motions finding a substantial likelihood existed that appellants would commit other crimes if released. *Birge v. State*, 238 Ga. 88 (230 SE2d 895) (1976). In their briefs appellants state that they timely filed notices of appeal from this decision, but later withdrew them. An appeal of this issue is now untimely.

(11) In case # 40227, appellant Merritt appeals from the denial of a subsequent motion for appeal bond. That case is dismissed as moot.

*Judgment affirmed. All the Justices concur*, except Weltner, J. not participating in case # 40315.

## ENDNOTES

[1] We point out that our holding here does not alter OCGA § 24-3-5, which provides "After the fact of conspiracy is proved, the declaration by any one of the conspirators during the pendancy of the criminal project shall be admissible against all."

[2] Downing testified that this conversation occurred "five or six months" prior to trial. Trial commenced on February 9, 1983.

[3] The record indicates the trial judge who ruled on the first motion to suppress heard Ledesma's motion to suppress in this case.

[4] For a discussion of Fourth Amendment implications where the papers seized are not instrumentalities of a crime, see Lafave, *Search and Seizure*, § 2.6(e), pp. 391-399.

40335

## APPENDIX B

## SUPREME COURT OF GEORGIA

ATLANTA, January 31, 1984

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

WESLEY MERRITT v. THE STATE

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Weltner, J., not participating.

**SUPREME COURT OF THE STATE OF GEORGIA,**

CLERK'S OFFICE, ATLANTA, March 13, 1984

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS Clerk.

40315

## APPENDIX C

## SUPREME COURT OF GEORGIA

ATLANTA, February 17, 1984

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

WESLEY MERRITT V. THE STATE

Upon consideration of the Motion to Recall and Stay the Remittitur filed in this case, it is ordered that it be hereby granted.

The trial court is requested to vacate any judgment entered on this court's remittitur in this case and to return the remittitur to the clerk of this court.

**SUPREME COURT OF THE STATE OF GEORGIA,**

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS Clerk.